Filed 6/5/07 P. v. Falcon CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID A. FALCON, Defendant and Appellant.	B187200 (Los Angeles County Super. Ct. No. BA272041)
In re DAVID A. FALCON, on Habeas Corpus	B192012

APPEAL from a judgment of the Superior Court of Los Angeles County, David Mintz, Judge. Affirmed. Petition for writ of habeas corpus denied.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David A. Falcon appeals from the judgment entered following a jury trial that resulted in his convictions for first degree murder and assault with a firearm. Falcon was sentenced to a term of 50 years to life in prison.

Falcon contends the trial court erred by: (1) admitting the preliminary hearing testimony of an unavailable witness; (2) admitting, during the People's rebuttal case, evidence of his statements to police; (3) declining to instruct the jury with CALJIC No. 8.73, regarding provocation; and (4) instructing with a modified version of CALJIC No. 2.52, regarding flight. In his petition for a writ of habeas corpus, which we consider concurrently with his direct appeal, Falcon contends his attorney was ineffective in a variety of ways. Discerning no reversible error, we affirm the judgment and deny the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's case.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following.

(i) *The crimes.*

On September 17, 2004, Sean Allen, Jonathan Carroll, and 15-year-old Roshanika Williams were sitting together on a bench at Jesse Owens Park in Los Angeles. Falcon and another man rode past on a bicycle, one pedaling and the other riding on the handlebars. Both were Latino, appeared to be in their late teens, and had close-shaven heads. The front passenger fell off the bicycle and Allen, Carroll, and Williams furtively laughed. Falcon and the other man walked into a bleachers area at the park. They then rode away.

A few minutes later, the bicyclists returned. Allen, Carroll, and Williams laughed again. The passenger asked what the group was looking at. No one responded. The bicyclists dismounted and walked up to the group on the bench. Falcon pulled out a gun

and pointed it at Carroll, but Falcon's companion said, "No, not him." Falcon then shot Allen in the abdomen from a distance of approximately 15 feet away. Allen fell to the ground. Williams assisted him into a nearby pool house, and called 911. Falcon and his companion ran away.

Allen bled to death.

(ii) *The investigation.*

Los Angeles Police Department (L.A.P.D.) officer Richard Mendoza and his partner responded to the call and observed Falcon and Emanuel Martinez in an alley near the park. Falcon and Martinez looked startled when they saw the officers. Falcon ran to his nearby residence, but Martinez was detained.[1]

Investigating detective Steve Burciaga found a .38-caliber silver bullet casing in front of the poolhouse. Burciaga served a search warrant at Falcon's residence on September 28, 2004. When Burciaga asked Falcon where the .380 was, Falcon directed him to a closet in the residence, where a gun was found. Ballistics tests determined that the gun had expelled the silver casing found in the park.

Officer Mendoza identified Falcon as the person he saw run away. Carroll identified Falcon as the shooter in a pretrial photographic lineup, as did Williams. Williams recalled Falcon's eyes and his distinctive, thick eyebrows. Williams further identified Falcon as the shooter at the preliminary hearing and at trial.

b. *Defense case.*

Falcon's fiancée, Josselin Hernandez, testified that Falcon was with her, at her residence, at the time of the shooting. Miguel Menjivar, who rented a room in Hernandez's residence, corroborated this account.

Noemi Ciao, who was employed by a nearby pizza restaurant, testified that she saw a Latino man running near Jesse Owens Park at around 5 p.m. on the day of the murder. Ciao was familiar with the man, having seen him before. He had a tattoo on the

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[1] Martinez was not identified by the witnesses and was not charged with the crimes.

back of his head that said "Joker," appeared to be between 20 and 22 years old, had thick eyebrows, and was riding a chrome-handled BMX bicycle.

Falcon's aunt, Anna Maria Sevilla, lived with the family.[2] She was developmentally slow. Sometime before Falcon was arrested, someone known as Joker left Anna a package, and said he would be back for it. Anna opened the package, saw a small black handgun, and hid the gun under the patio. She did not tell anyone about the incident until later, because she was afraid she would get in trouble. On the night Falcon was arrested, a young man came to the family residence. He was wearing a shirt that bore the name "Joker," and had a "Joker" tattoo on the back of his head. He asked to pick up the backpack he had given Anna. Falcon's mother, Yolanda Sevilla, told him to retrieve it from the police station.

According to Yolanda, the night Falcon was arrested, police came to the house with guns, threw her against a wall and to the ground, and held her there. According to her, she had abrasions on her face and knees and was admitted to the hospital for a blow to her head.

c. *People's rebuttal.*

The People presented evidence that Yolanda threw rocks and dirt at officers, and pulled a knife on them. She was handcuffed for a brief period, but none of the officers threw her against a wall or injured her.

Detective Myers corroborated Detective Burciaga's account regarding Falcon's disclosure of the gun's location.

When Falcon was arrested, Detectives Myers and Burciaga interviewed him. They asked Officer Jeanette Garcia and her partner, Officer Richard Ramos, to book Falcon. During the booking process, Falcon said he was "stressed out" and wanted to speak to the detectives. He stated that everything was "messed up." He was not the one who "did it"; instead, it was his brother. He explained that he was riding his bicycle, with his brother on the handlebars, when a group of Black men began mad-dogging him, i.e.,

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[2] For ease of reference, we hereinafter sometimes refer to Anna Maria and Yolanda Sevilla by their first names.

looking at him in a hostile fashion. Falcon's brother jumped off the bicycle and shot one of the Black men in the stomach.

Detective Myers then interviewed Falcon. Falcon repeated his account, adding that his brother Eric had tossed the gun in a nearby alley. The next day, Falcon smoked some marijuana and retrieved the gun.

When shown a photograph of Falcon's brother before trial, Williams asked whether the photograph was of the individual she had already identified, and stated that Eric's photograph looked similar to Falcon's. When shown Falcon's photograph again, however, she reaffirmed that Falcon was the shooter.

d. *Surrebuttal.*

The defense presented a further account of Yolanda's mistreatment at the hands of the arresting/searching officers.

2. *Procedure.*

Trial was by jury. Falcon was convicted of first degree murder (Pen. Code, § 187, subd. (a))[3] and assault with a firearm (§ 245, subd. (a)(2)). The jury found true the allegation that Falcon personally and intentionally discharged a firearm, causing Allen's death (§12022.53, subd. (d)), and personally used a firearm in commission of the assault (§ 12022.5, subd. (a)). The trial court sentenced Falcon to a term of 50 years to life in prison. It imposed a direct victim restitution fine, a restitution fine, and a stayed parole revocation fine. Falcon appeals.

DISCUSSION

1. *Because the People demonstrated due diligence, the trial court did not err by admitting Carroll's preliminary hearing testimony pursuant to Evidence Code section 1291.*

Falcon contends his confrontation rights were violated by admission of eyewitness Carroll's preliminary examination testimony because the People did not establish they

[3] All further undesignated statutory references are to the Penal Code.

had used reasonable diligence to locate Carroll and secure his appearance at trial. We disagree.

a. *Additional facts.*

The prosecutor moved to admit Carroll's preliminary hearing testimony pursuant to Evidence Code section 1291.[4] Accordingly, the trial court conducted a "due diligence" hearing, at which the following evidence was adduced. Carroll, who was 18 years old and lived with his mother, was subpoenaed to appear at the March 15, 2005 preliminary hearing. Just before the preliminary hearing, in the courthouse hallway, both Carroll and Carroll's mother informed Detective Burciaga that Carroll would not testify. Carroll's mother was "very uncooperative." She insisted that her son's life was in jeopardy and that police would be unable to provide adequate protection. Burciaga explained the importance of Carroll's testimony and stated that "it was a court order." Burciaga offered to relocate the family, but Carroll's mother "absolutely refused." Carroll refused to testify. A bench warrant was or had already been issued, and Carroll was brought into the courtroom in handcuffs. Carroll did testify at the preliminary hearing, though hesitantly. Because Carroll did eventually testify at the preliminary hearing, Burciaga did not anticipate Carroll would ultimately refuse to testify at trial.

At the preliminary hearing, the court ordered Carroll to return on the next court date, March 29, 2005. Carroll appeared as ordered, and was placed on call to the People.

Carroll had been ordered back to court for the trial setting conference on May 26, 2005, but did not appear. In approximately mid-August 2005, the prosecutor notified Burciaga that he was having difficulty getting in touch with Carroll. Burciaga began looking for Carroll on August 16, 2005, more than six weeks before the September 27, 2005 start of trial. On August 24, 2005, the trial court was notified that Carroll was uncooperative, and a body attachment was issued for him. The attachment remained outstanding during trial.

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[4] In the portion of the preliminary examination testimony introduced at trial, Carroll described the circumstances of the shooting and testified that he had identified Falcon in a pretrial photographic lineup.

In August and September 2005, Burciaga made numerous visits to the Carroll home, on August 16, 17, 24, and 31, and on September 8, 12, and 21, at times varying between 7:00 a.m. and 4:30 p.m. No one answered the door on any of those occasions, although someone was inside the house at least once. Burciaga left his business card on each occasion. Approximately two weeks prior to trial, Burciaga arranged a surveillance of the residence from early morning until late afternoon, but Carroll was never observed. Based on the information available to Burciaga, Carroll's residence was still with his mother.

Believing that Carroll's mother worked for a law enforcement department, Burciaga and his partner called the Los Angeles County Sheriff's Department, the Los Angeles County Police, the Inglewood Police Department, and the Parks and Recreation Department to determine whether she worked at those locations; she did not.

On September 21, 2005, Burciaga called the telephone number Carroll had given him, but it belonged to a different individual. On September 27, Burciaga checked the L.A.P.D. system to determine whether Carroll was in custody; he was not. Burciaga also checked four local hospitals to see if Carroll was there; he was not. On September 28, during the lunch break prior to the due diligence hearing, Burciaga asked Williams if she knew Carroll's whereabouts; she did not. Relatives of the victims, however, had seen Carroll the Monday prior to trial in the neighborhood of the Carroll residence.

Two days after the due diligence hearing commenced, after making further inquiries, Burciaga located Carroll's mother at her workplace, a relatively obscure county police office. Burciaga spoke to her on the telephone. She was "very upset." She confirmed that she and Carroll lived at the residence Burciaga had repeatedly visited. She did not see Carroll every day; he was often "gone two to three days at a time." She stated, "I told you he ain't gonna testify after [the preliminary hearing]." Burciaga gave her information about the date and courtroom where Carroll should appear. She stated she would tell Carroll about the trial if she saw him. She then hung up on Burciaga. Burciaga tried to call her back, unsuccessfully. Burciaga had also confirmed Carroll's address with the Department of Motor Vehicles.

The trial court concluded the People had exercised due diligence. In response to defense counsel's suggestion that other efforts might have been undertaken to find Carroll, the court observed that "one can always find additional things that could be done, regardless of how extensive and thorough the effort is," but the question was whether due diligence was shown by the efforts that had actually been undertaken. The trial court observed that it did not believe a face-to-face interview with Carroll's mother would have been productive, given her determined noncooperation. The court pointed out that it was unusual for the People to have a witness ordered back at the preliminary examination, but the People had done so because of their concern about the witness's lack of cooperation. The court found, "It's clear that you have not simply a witness that can't be located, but one that does not want to be located and one that appears to be actively seeking to avoid the outstanding body attachment." After cataloguing the People's efforts to find Carroll, the court concluded, "I think it's clear there has been reasonable diligence to secure the attendance of the witness." Accordingly, the court found Carroll was unavailable as a witness and ruled his preliminary hearing testimony admissible.

b. *Discussion.*

(i) *Applicable legal principles.*

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. [Citations.] That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 892; *People v. Smith* (2003) 30 Cal.4th 581, 609.)

California Evidence Code section 1291 contains a similar requirement. As relevant here, it provides that former testimony is admissible as an exception to the hearsay rule if: (1) the witness is unavailable; and (2) the former testimony is offered against a person who was a party to the action or proceeding and had the right and

opportunity to cross-examine the declarant with an interest and motive similar to that which he or she has at the current proceeding. To establish unavailability, the proponent of the evidence must show the declarant is absent from the hearing and that the proponent has exercised reasonable diligence (often referred to as "due diligence"), but has been unable to procure the witness's attendance by the court's process. (Evid. Code, § 240 subd. (a)(5); *People v. Smith, supra*, 30 Cal.4th at pp. 609-610; *People v. Sanders* (1995) 11 Cal.4th 475, 522-523; *People v. Cummings* (1993) 4 Cal.4th 1233, 1296.) The proponent of the evidence has the burden of establishing unavailability by competent evidence. (*People v. Cummings, supra*, at p. 1296; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

"Due diligence" is not susceptible to a mechanical definition, but " 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citation.]" (*People v. Sanders, supra*, 11 Cal.4th at p. 523.) Whether due diligence is shown depends upon the totality of efforts used to locate the witness. (*Ibid.*) Relevant considerations include the character of the prosecution's efforts; whether the search was timely begun; the importance of the witness's testimony; whether leads were competently explored; whether the proponent of the evidence reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena the witness when he or she was available; and whether the witness would have been produced if reasonable diligence had been exercised. (*People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Sanders, supra*, at p. 523.)

Whether a party exercised reasonable diligence to locate a missing witness is a mixed question of law and fact. (*People v. Cromer, supra*, 24 Cal.4th at p. 894.) When, as here, the facts regarding the prosecution's efforts to locate the witness are undisputed, we evaluate the question of due diligence independently. (*Id.* at pp. 900-901; *People v. Smith, supra,* 30 Cal.4th at p. 610.)

(ii) *Application here.*

The trial court correctly ruled that the People exercised reasonable diligence to locate Carroll and procure his testimony at trial. Contrary to Falcon's argument, Detective Burciaga's efforts were certainly timely, beginning approximately six weeks before trial.[5] Numerous courts have held that the fact a search is begun as late as shortly before or during trial does not necessarily preclude a finding of reasonable diligence. (*People v. Lepe* (1997) 57 Cal.App.4th 977, 986-987, disapproved on other grounds in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3; *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1236-1239, disapproved on other grounds in *People v. Cromer, supra,* at p. 901, fn. 3; [due diligence established, although prosecutor issued subpoena and began search for witness eight days before trial].)

Burciaga's efforts were clearly substantial and undertaken in good faith. He competently explored the only leads available to him. He visited Carroll's home seven times; arranged for a surveillance of Carroll's home; tried to telephone Carroll; attempted to reach Carroll through his mother, whom he tracked down at her place of employment; asked another witness if she knew where Carroll was; and checked to determine whether Carroll was in custody or a hospital. A body attachment was issued for Carroll, which remained outstanding during trial. These efforts cannot be characterized as unreasonable or cursory. It was, however, quite clear that Carroll was determined not to testify and was skillfully avoiding the People's efforts to find him. (See generally *People v. Diaz, supra,* 95 Cal.App.4th at pp. 705-707; *People v. Lepe, supra,* 57 Cal.App.4th at pp. 985-987.)

People v. Cromer, supra, 24 Cal.4th 889, cited by Falcon, is readily distinguishable. Unlike in *Cromer*, Burciaga did not fail to follow up on a promising lead. In *Cromer*, the prosecution did not demonstrate due diligence in attempting to locate the victim of the crime, the key prosecution witness. (*Id.* at p. 905.) *Cromer*

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[5] Trial was originally set for August 22, 2005. However, Burciaga kept "in close contact" with the district attorney regarding whether the trial would actually begin on that date. Burciaga's experience was that criminal trials often do not begin on the date set.

explained: "Although the prosecution lost contact with [victim and witness Culpepper] after the preliminary hearing, and within two weeks had received a report of her disappearance, and although trial was originally scheduled for September 1997, the prosecution made no serious effort to locate her until December 1997. After the case was called for trial on January 20, 1998, the prosecution obtained promising information that Culpepper was living with her mother in San Bernardino, but prosecution investigators waited two days to check out this information. With jury selection under way, an investigator went to Culpepper's mother's residence, where he received information that the mother would return the next day, yet the investigator never bothered to return to speak to Culpepper's mother, the person most likely [to] know where Culpepper then was. Thus, serious efforts to locate Culpepper were unreasonably delayed, and investigation of promising information was unreasonably curtailed." (*Id.* at p. 904.) Here, in contrast, Burciaga started looking for Carroll well before trial, contacted or attempted to contact Carroll's mother repeatedly, and did not ignore promising leads.

Falcon's further contention that the People failed to show diligence because they did not stay in contact with Carroll during the approximately five months after he was told he would be notified of the next court date is equally unavailing. As we explained in *Diaz*, "A court cannot 'properly impose upon the People an obligation to keep "periodic tabs" on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state or simply "disappear," long before a trial date is set.' [Citation.]" (*People v. Diaz, supra*, 95 Cal.App.4th at p. 706.)

Falcon relies on *People v. Louis* (1986) 42 Cal.3d 969, 982, in support of his argument. *Louis* is distinguishable. In *Louis*, a crucial witness *was in custody* on theft charges. In order to procure his testimony, the People allowed his release on his own recognizance to visit an unspecified friend at an undesignated location, although the People knew there was a substantial risk that he would flee. *Louis* held that because the People allowed the witness's release but failed to take adequate preventative measures,

no due diligence was shown. (*Id.* at pp. 990-992.) Here, in contrast, there was no suggestion that the People had, but relinquished, the same sort of control over Carroll, nor could they have held him as a material witness until trial. (See, e.g., *People v. Hovey* (1988) 44 Cal.3d 543, 564.)

Falcon next argues that the People could have: (1) had the trial court at the preliminary hearing define "on call" and admonish Carroll that his failure to stay in contact with the prosecution would result in a contempt order or arrest warrant; (2) required Carroll to post a bond to ensure his appearance; (3) requested that their investigator "keep periodic tabs" on Carroll; (4) determined whether Carroll was employed or in school, and looked for him there; (5) contacted Carroll's mother sooner; (6) visited Carroll's mother at her workplace; and (7) visited Carroll's home in the evening, when he was purportedly more likely to be present. These arguments are unavailing. As we have noted *supra,* the People have no duty to keep periodic tabs on a witness. Moreover, it is settled that the fact "additional efforts might have been made or other lines of inquiry pursued does not affect [a finding of due diligence]. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings, supra,* 4 Cal.4th at p. 1298; *People v. Diaz, supra,* 95 Cal.App.4th at p. 706; *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1641, disapproved on other grounds in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3 ["Although appellant suggests the prosecution might have pursued other lines of inquiry (such as jobs, schools or voter registration records), the prosecution need not exhaust every potential avenue of investigation to satisfy its obligation to use due diligence to secure the witness." [Fn. omitted.]]; *People v. Wise* (1994) 25 Cal.App.4th 339, 344.) As we explained in *Diaz,* we " 'will not reverse a trial court's determination . . . simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts "unreasonable." [Citations.] The law requires only

reasonable efforts, not prescient perfection.' [Citations.]" (*People v. Diaz, supra,* at p. 706.) Nor are the People required to pursue futile acts not likely to produce the witness for trial. (*People v. Smith, supra,* 30 Cal.4th at p. 611; *People v. Hovey* (1988) 44 Cal.3d 543, 562.) Here, there is no reason to believe the additional steps suggested by Falcon would have been fruitful, given Carroll's noncooperation.

Finally, Falcon argues the People had "a bench warrant . . . . issued without providing proof [Carroll] had ever been notified to appear for trial." Falcon argues that, absent evidence Carroll had actually been ordered to appear pursuant to a subpoena or court order, the bench warrant was issued without legal cause. Assuming arguendo that Falcon is correct, it is unclear how this circumstance had any practical effect on the People's due diligence showing. This was not a case in which Carroll was located, but slipped away due to a defective bench warrant. Carroll could not be located at all. Therefore, any theoretical defect in the bench warrant is irrelevant to the due diligence showing.

2. *Defense counsel was not ineffective for failing to more effectively move for exclusion of Falcon's statements to detectives and booking officers.*

a. *Additional facts and contentions.*

As noted, Falcon made statements during booking, and then to detectives, to the effect that he was at the murder scene but his brother was responsible. Prior to trial, Falcon moved to suppress this evidence, on the ground that further questioning occurred after he had invoked his right to counsel. The trial court held a hearing pursuant to Evidence Code section 402 to determine whether Falcon's statements should be excluded under *Miranda v. Arizona* (1966) 384 U.S. 436. The following evidence was adduced at that hearing.

(i) *Detective Myers's testimony.*

Detective Myers testified that he and Detective Burciaga arrested Falcon on September 28, 2004 and read him his *Miranda* rights. Falcon indicated he understood. Falcon stated that he "wanted a lawyer," and the detectives ceased all questioning. As detectives stood up to leave the interview room, Falcon spontaneously whispered to

Myers, "It was my brother." Myers asked whether he wished to "talk more about it?" Falcon saw that a tape recorder was running and said, "forget about it."

Two uniformed police officers were summoned to complete the booking process. One of them, Officer Ramos, subsequently told Myers that Falcon "wanted to talk to me again" and had stated he was "present at the time of the shooting, but that it wasn't him, that it was his brother." Myers and Burciaga returned to the interview room and sat down. Myers said, "I understand you want to talk." Falcon replied, "Yeah, I do. I want to talk. I want to tell you what happened." When Falcon saw the tape recorder, he stated that he did not want to "say it on tape." The detectives left.

Subsequently, a booking officer again advised Myers that Falcon wanted to talk to them. Myers told Falcon, "Hey, listen, [this is the] third time we've been down here. You keep calling us down here. Do you want to talk about this." Falcon stated, "Yeah, I do. I want to tell you what happened." Falcon then made the statements discussed above.

On each occasion when the detectives spoke with Falcon, detectives advised that Falcon did not have to talk to them.

(ii) *Officer Ramos's testimony.*

Officer Richard Ramos testified that he was given the responsibility of booking Falcon. Before the booking process began, Falcon spontaneously stated he was nervous and asked what he should do. Ramos asked whether he had spoken to detectives, and Falcon stated he had spoken to them and had told them he was at the crime location, but did not pull the trigger. Falcon then stated that he wanted to speak to the detectives about his case.

Ramos alerted the detectives, who took Falcon with them. They then returned Falcon to Ramos so he could begin the booking process. During the booking process, Falcon spontaneously stated that he had told detectives he was at the crime location, but that he did not pull the trigger. He then stated that he had gone to the park with his brother; that he and his brother were on his bicycle on the way to play handball; that

some "Black guys were mad-dogging him"; and that his brother jumped off the bike and shot one of them. They then ran home. Falcon again asked to speak to detectives.

All Falcon's statements were made spontaneously; Ramos did not ask him any questions regarding the crimes. The only questions Ramos asked were those pertinent to the booking process, such as whether he had any medical problems.

(iii) *Parties' arguments and the trial court's ruling.*

According to the prosecutor's representation, a tape recording of the second interview, but not the third, was made. After the evidence had been presented, the trial court asked whether either party wished the court to listen to the tape recording. Both attorneys said no.

After hearing the parties' arguments, the trial court made the following findings. Both Detective Myers and Officer Ramos were credible. Falcon was properly *Mirandized* initially, and invoked his right to counsel. Myers "scrupulously" honored his request and ceased all questioning. Falcon's spontaneous statement inculpating his brother was not obtained in violation of *Miranda,* as it was not deliberately elicited by officers and was made after officers had ceased questioning. Falcon then reinitiated the interview when he was with Officer Ramos. Falcon's demand for counsel did not preclude a reinterview when Falcon himself initiated contact and made a reinterview request. The statement by Officer Ramos, "Did you talk to the detectives," was not significant and was not designed to initiate an incriminating response. During the second interview with detectives, which Falcon reinitiated, again detectives scrupulously honored Falcon's reinvocation of his right to counsel. The statements made to Officer Ramos did not violate *Miranda* because they were spontaneous statements, not the result of custodial interrogation. Accordingly, the trial court held *Miranda* did not preclude admission of Falcon's statements.

(iv) *Evidence presented in Falcon's habeas petition.*

In his petition for a writ of habeas corpus, Falcon asserts his counsel was ineffective for failing to introduce transcripts of the first and second interviews which, he

asserts, would have impeached Detective Myers and led to exclusion of his statements to police. In support of his petition, Falcon presents transcripts of the interviews.

A. *First interview with detectives.*

The transcript of the first interview with detectives shows that Falcon was read his *Miranda* rights. When Falcon stated he understood, Burciaga stated, "Okay. Do you want to talk about what happened?" Falcon replied, "Hum?" Burciaga replied, "And what I'm talking about is we're investigating a shooting that happened over at the park about a week and a half ago, Jesse Owens Park in particular. [¶] Okay. Now it wasn't happenstance that we came to your house, all right? We have some information. We know that you were there. I want to get your side of the story. [¶] This is your opportunity right now to say, hey, this is what happened so on, so forth . . . ." The following exchange transpired:

"[Falcon]: No. [All] I got to say. I [inaudible] if I get my lawyer? I ain't gonna – I ain't gonna help you. I mean, all I gotta say is I'm innocent that that's it. Stay out.

"[Burciaga]: What did you say?

"[Falcon]: I said, 'Stay out.'

"[Burciaga]: Oh, I thought you said, 'Peace out.'

"[Falcon]: No, I didn't say that. You know, I'm being -- in other words, um, in other words, um I'm being -- you know what I'm trying to say; right? You guys understand me?

"[Myers]: Okay. Well, I just want to make sure that you understand. I'm not trying to talk you into anything. But . . . we're gonna present a case. [¶] We have one side of the story. I'd like to hear your version, your side, what you know about it. Um, you have absolutely the right to say, hey, you know what, I don't want to talk. But, uh, I'm gonna take the time and, you know, see if you do want to talk to us. But this has got to be on your own, all right?

"[Falcon]: Like I told you, man, . . . I want to talk to my lawyer.

"[Burciaga]: All right. Fair enough. That will be it. I gotta fill out some paperwork on you." Falcon then asked, "what's going on?" Burciaga replied, "You're

being arrested." Falcon asked what he was being arrested for, and Burciaga replied, "For a shooting." Falcon asked, "Shooting? Well, what [is it?] What's the . . . charge? Shooting what?" Burciaga replied, "Murder." Falcon queried, "Murder?" Burciaga replied, "The kid died. Looks like you want to say something." Falcon stated he wanted a lawyer, and asked when he could speak to one. Burciaga replied Falcon could speak to a lawyer as soon as one was appointed, after he was arraigned. In response to Falcon's questions, Burciaga stated he could call his mother as soon as he was booked. Burciaga gave Falcon his card, and told him to call him if he changed his mind.

Falcon then asked, "But, like, do they got me as a suspect or do they got me as the shooter totally? I want to know." Burciaga replied, "Well, we can't . . . really talk anymore because you've asked to see a lawyer." Burciaga then asked a series of questions unrelated to the crimes and apparently related to the booking process.

B. *Second interview with detectives.*

Appellate counsel has prepared a transcription of Falcon's second contact with detectives. In that interview, a Detective Baker introduced himself and explained that the interview was being taped. An unidentified detective (presumably Myers) stated, "You called me back in here because you want to tell me [unintelligible]. Just put it on the table, and tell me what happened." After a pause, the detective says, "You don't want to say it on the record. Well then it's meaningless. You brought me back in here, okay. I'm trying, I've got officers waiting to take you downstairs. If you want to explain yourself and tell what happened, you've gotta do it the right way. The way everybody is protected. Okay?" The detective then states, "Now you whispered it was your family." Falcon's reply is unintelligible. Myers stated, "You were lying when you told me right now, before you came in the room, that it was your brother. You were lying . . . Okay . . . You're making a mistake. You brought me back in here so . . . you wanted to talk." Falcon's reply is unintelligible.

Falcon then stated that he was framed. Myers asked whether Falcon was lying when he whispered to him. Falcon replied, "He's not my brother." Myers asked, "He's not your brother. Is he a friend?" Myers then asked what the individual looked like, and

offered to bring a photograph. After an unintelligible response from Falcon, Myers said, "Okay. Quit calling me back here."

b. *Discussion.*

Falcon argues that trial counsel should have offered these tape recordings of the interviews in support of the motion, because they would have impeached Myers's testimony and would have caused the trial court to rule differently on his motion. In particular, Falcon asserts that the transcript of the initial interview demonstrated that, in contrast to Myers's testimony, Falcon invoked his right to counsel three times during the first interview; despite his initial invocation, detectives continued to talk to him; he was misadvised that he would not get a lawyer until he was arraigned; and detectives refused his request to call his mother before he was booked. Further, the tapes show he did not waive his previously asserted right to counsel before talking to detectives again. Falcon urges, "The detectives' conduct had its desired psychological effect of getting petitioner to change his mind about talking to them." Had the trial court had the evidence of the tape recordings before it, he urges, it would have excluded his statements.

We disagree. For the most part, the tape recordings corroborated and supported the People's motion. Because there is no reasonable probability the tape recordings would have caused the trial court to rule differently, the ineffective assistance claim fails.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) We presume that counsel's conduct " 'falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the ' "perilous process" ' of second-guessing counsel's trial strategy. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1158.)

We can dispense with several of Falcon's contentions at the outset. First, the detective's statement that Falcon could call his mother only after booking could have had no effect on the trial court's consideration of the motion to exclude evidence. Falcon cites no authority that an arrestee is entitled to telephone relatives the precise instant he or she makes such a request. There is no showing the booking process was expected to be lengthy. In essence, Falcon was told he could call his mother shortly; this was neither coercive nor probative on the merits of the motion. Trial counsel was not ineffective for failing to ensure the court was aware of this aspect of the interview.

Second, the contention that Falcon invoked his right to counsel three times during the initial interview, rather than once, would not have assisted Falcon's position. Myers testified that after he was advised of his rights, Falcon stated he wanted a lawyer. Thus, there was no dispute that Falcon invoked his right to counsel at the beginning of the interview. We need not decide whether Myers's testimony was inaccurate, as Falcon suggests, or whether Falcon's three references to a lawyer in the space of three pages of transcript amount to three separate invocations or merely a "semantic quibble," as asserted by the People. Myers's testimony was not materially impeached by the tape recording.

Third, Falcon asserts that the tape did not show he stated his brother was the shooter. Even assuming arguendo Falcon is correct, [6] the tape of the second interview clearly showed one of the detectives asking Falcon about his whispered statement that "it was your family." Thus, the tapes would not have established the officer was inaccurate on this point. To the contrary, the tapes would have corroborated the People's witnesses.

Next, Falcon contends that, contrary to Myers's testimony, questioning continued after he initially invoked his right to counsel. A custodial interrogation must be preceded by an advisement the accused has a right to counsel. (*Miranda, supra,* 384 U.S. at pp. 478-479.) "The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution and by article I, section 15 of the California

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[6] We note that the prosecutor told the trial court that the whispered statement *was* on the tape, but was "very, very hard to make out what the defendant is saying."

Constitution 'is protected in "inherently coercive" circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, the presence of an attorney, and, if indigent, to appointed counsel.' [Citations.] ' " 'If a suspect indicates "in any manner and at any stage of the process," prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated.' " ' [Citation.] Rather, ' "the interrogation must cease until an attorney is present." ' [Citation.] Moreover if, in violation of this rule, interrogation continues of an in-custody suspect who has asked for but has not been provided with counsel, the suspect's responses are presumptively involuntary and therefore 'are inadmissible as substantive evidence at trial.' [Citations.] Such exclusion is not required, however, when the 'suspect personally "initiates further communication, exchanges, or conversations" with the authorities.' [Citations.] The rule that interrogation must cease because the suspect requested counsel does not apply if the request is equivocal; '[r]ather, the suspect must unambiguously request counsel.' [Citation.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 266.)

"[N]ot all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response." (*People v. Clark* (1993) 5 Cal.4th 950, 985.) For example, a brief statement informing an in-custody defendant about evidence against him is not the functional equivalent of interrogation, because it is not the type of statement likely to elicit an incriminating response. (*People v. Haley* (2004) 34 Cal.4th 283, 302.)

The transcript demonstrates that Falcon made one unintelligible, and largely incomprehensible, statement referencing counsel. After that point, though the detectives continued talking to Falcon, none of their statements can be construed as interrogation. Myers's statement – not phrased as a question – that he had one side of the story and would like Falcon's version, was not the functional equivalent of questioning. The statement was made in conjunction with representations that it was Falcon's right not to talk, and had to be his decision. (See *People v. Haley*, *supra*, 34 Cal.4th at p. 302.) Nor

can the detectives' brief and factual answers to Falcon's questions be considered interrogation. Thus, presentation of the tape recording of the first interview would not have assisted Falcon. Moreover, the tape did nothing to rebut Officer Ramos's testimony that Falcon spontaneously volunteered further statements to him.

Falcon also asserts the tape of the second interview did not show officers obtained waivers of his previous invocation of rights. However, the People did not seek to introduce any statements obtained at the second interview. Falcon personally and spontaneously initiated further communication with the authorities after the second interview. (See, e.g., *People v. Sapp, supra,* 31 Cal.4th at p. 266.) The tapes shed no light on whether waivers were taken prior to the third interview, the substance of which was admitted at trial.

Nor do we believe the trial court would have found the detectives coerced Falcon had it heard the tape recordings. *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, cited by Falcon, is distinguishable. There the defendant requested counsel during a custodial interrogation. The interrogating officer pressured him into talking by predicting a lawyer would direct him not to speak with the police and "it might be worse" for him if he did not talk to police. (*Id.* at pp. 414.) The officer's menacing comments, which effectively told the defendant he would be penalized for exercising his constitutional rights, rendered his confession involuntary and inadmissible. (*Id.* at pp. 413, 416-417.) Here, in contrast, the detectives did not threaten Falcon that he would be penalized for exercising his rights, nor was the detective's remark that they would like to get his side of the story coercive. To the contrary, the detectives simply told Falcon he did not have to talk to them, and it was his choice.

In sum, Falcon has failed to show prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*People v. Carter, supra,* 30 Cal.4th at p. 1211.) Accordingly, his ineffective assistance claim lacks merit.

3. *Evidence of Falcon's statements to Myers and the booking officers was not improper rebuttal evidence.*

a. *Additional facts.*

At the close of the defense case, the People sought to introduce Falcon's aforementioned statements to Myers, Ramos, and another booking officer, Garcia, to the effect that he had been present at the shooting but that his brother was the shooter. Defense counsel argued that the evidence was improper rebuttal. The court concluded to the contrary. It reasoned that the entire thrust of the defense case had been to establish an alibi and prove Falcon was not present at the shooting scene. Falcon's statements to the officers, if credited by the jury, would establish that the defense witnesses were either mistaken or lying. "Certainly [the prosecutor] did not want to have to put these statements on in his case in chief. They are, in effect, exculpatory. The defendant says he was present at the time of the shooting but someone else did the shooting." Thus, the trial court concluded the evidence was proper rebuttal evidence.

During closing argument, the prosecutor stated, "Folks, I did not introduce the defendant's statements to you in my case in chief. And I'll be straightforward about that. I did not. Because I was waiting to see what the defense was going to put forward. And the defense put forward this alibi case. No one knew about this alibi case. I didn't know about it until the day before you were selected as a jury. And so when that was brought to my attention, I made a tactical decision I am not going to put on the defendant's statements. I'm going to wait to see what the defense does. And the defense put on an alibi that he was not there. And that's when I decided to show you that he admitted he was at the location."

b. *Discussion.*

Falcon urges the trial court abused its discretion by allowing the People to present the challenged testimony, which he contends was a material part of the prosecution's case tending to establish the defendant's commission of the crime. We discern no error.

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of

that discretion. [Citations.] ' "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." ' [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 335-336; § 1093, subd. (d); *People v. Young* (2005) 34 Cal.4th 1149, 1199.) "Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial. [Citations.]" (*People v. Young*, *supra*, at p. 1199.) The order of proof rests largely in the sound discretion of the trial court, and "the fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 68-69.) "It is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence." (*Ibid.*)

Evidence of Falcon's statements that he was at the park but not the shooter was not a material part of the case tending to establish the defendant's commission of the crime. To the contrary, if Falcon's statements were believed, he was *innocent* of wrongdoing. He stated that his brother unexpectedly pulled out a gun and shot the victim. If this evidence was credited by the jury, it would have provided a complete defense to the charges. While the admission that Falcon was at the park, viewed in isolation, tended to support the People's case-in-chief, this fact does not make it improper rebuttal. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 68.) Further, admission of the challenged rebuttal was necessitated entirely by Falcon's case. His alibi defense was not implicit in his denial of guilt.

The facts bear little resemblance to those in *People v. Carter* (1957) 48 Cal.2d 737, 753-754. In *Carter*, the defendant was charged with the murder of a bar owner. The victim's wallet, a wrench, and a red cap were found under a bridge near the defendant's house. A neighbor testified that he had lent the defendant a wrench similar to the one found under the bridge, and grease on the wrench matched grease found on the floor of the bar. The defendant denied committing the murder, and claimed he had not been to the bridge or left the wallet or wrench there. On rebuttal, the People were allowed to admit evidence that the red cap containing the defendant's hair was also found under the bridge. (*Id.* at pp. 743, 752.) This was improper rebuttal. The court reasoned the red cap was crucial evidence tending to show the defendant had put the wallet and wrench under the bridge, and therefore was the person who had robbed and beaten the victim. The defendant's not guilty plea made it clear he would not admit having gone to the bridge, and his denial on the stand furnished no new matter for rebuttal. Therefore the evidence should have been put on in the case-in-chief. (*Id.* at p. 754.) Falcon's statements were not of this ilk. They did not prove Falcon was the person who shot the victim. To the contrary, if credited Falcon's statements proved he was not the shooter and was unaware the shooting would transpire.

Nor does *People v. Miller* (1963) 211 Cal.App.2d 569, cited by Falcon, compel a different result. In *Miller*, the defendant was charged with robbery. In their case-in-chief, the People put on evidence from several eyewitnesses to the effect that the defendant was one of the robbers. They also put on evidence that the defendant had confessed to a police officer. The defendant put on an alibi defense. He denied taking part in the robbery. He and four other witnesses testified he was at a bachelor party at the time the robbery occurred. (*Id.* at p. 574.) The defendant denied making the admissions attributed to him by the officer. In rebuttal, the officer who had testified to the defendant's confession testified that he had overheard a conversation between the defendant and a cellmate in which the defendant made incriminating statements. On appeal, the rebuttal evidence was held to be improper, in that statements impeaching a party may be offered in the People's case-in-chief, and the evidence simply repeated what

had already been offered in the case in chief. (*Id.* at p. 575.) However, the error in admitting the evidence in rebuttal was not prejudicial. (*Id.* at p. 579.)

Here, evidence of Falcon's statements was clearly not a repeat of testimony offered in the People's case-in-chief. Instead, it was primarily exculpatory evidence, and its admission was wholly necessitated by Falcon's alibi defense. Falcon presented evidence he was *not* at the park, contrary to the testimony of the prosecution's witnesses. "Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal." (*People v. Young, supra,* 34 Cal.4th at p. 1199.) As explained in *People v. Williams* (1958) 164 Cal.App.2d 285, 292, the prosecutor had made a clear case before resting. "It was not necessary for him to anticipate and disprove every possible defense or alibi of the defendant." (*Id.* at p. 292.)

Falcon argues the prosecutor's closing argument demonstrated the prosecutor purposely withheld the evidence in order to surprise the defense. We disagree. The prosecutor's argument shows, instead, that the People chose not to introduce evidence that was, in many respects, unfavorable to their case until it became necessary to do so to rebut the defense theory. Had the defense ultimately not put on an alibi defense, or managed only a weak attempt, the prosecutor might have chosen not to introduce Falcon's statements, which were exculpatory and suggested an alternative defense to the crimes.

4. *The trial court was under no obligation to give CALJIC No. 8.73 sua sponte; any error in declining to give the instruction was harmless.*

When discussing jury instructions, the trial court conferred with the parties regarding which lesser included offenses applied. The court queried of defense counsel, "The defense's position . . . is that on count 1 [murder], I should give first, second and voluntary manslaughter; is that right?" Defense counsel responded affirmatively. The court asked defense counsel to explain why a voluntary manslaughter instruction was warranted. Defense counsel responded that the evidence indicated Falcon's passions or anger were aroused by being "laughed at and disrespected" or given an "evil stare"; there

was no evidence of premeditated murder; and the shooter had aimed at the victim's abdomen rather than his head or heart. The trial court rejected this theory, concluding there was insubstantial evidence to support a voluntary manslaughter instruction based on sudden quarrel or heat of passion.[7] There was no evidence before the jury that Falcon's reason was actually obscured by heat of passion, and no ordinarily reasonable person's passions would have been aroused by the circumstances. Defense counsel did not request instruction with CALJIC No. 8.73.

Falcon now argues that the trial court erred by "refusing to give" CALJIC No. 8.73, regarding the relation of evidence of provocation to the premeditation and deliberation when the provocation is insufficient to reduce a homicide to manslaughter.[8] Falcon urges that defense counsel "requested the jury be instructed" on the principles set forth in CALJIC No. 8.73, but the trial court misinterpreted his comments as only a request to instruct on voluntary manslaughter as a lesser included offense.

Falcon's characterization of the record is unpersuasive. The parties' discussion was expressly directed to the issue of lesser included offenses. Defense counsel never expressly or implicitly requested CALJIC No. 8.73. Based on our review of the record, the trial court could not reasonably have understood defense counsel's comments as a request for CALJIC No. 8.73. Thus, the trial court was under no duty to give it. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879 ["Because CALJIC No. 8.73 relates the evidence of provocation to the specific legal issue of premeditation and deliberation, it is a 'pinpoint' instruction . . . and need not be given on the court's own motion."].)

Further, the omission of CALJIC No. 8.73, even if error, was harmless. In order to reduce a killing to manslaughter, the defendant must have acted under a heat of passion " 'as would naturally be aroused in the mind of an ordinarily reasonable person under the

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[7] Falcon does not challenge this ruling.

[8] The standard version of CALJIC No. 8.73 provides, "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

given facts and circumstances.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Ochoa* (1998) 19 Cal.4th 353, 422-423; *People v. Lee* (1999) 20 Cal.4th 47, 59.) Evidence of provocation that is insufficient to reduce a murder to manslaughter may nonetheless raise a reasonable doubt about the element of premeditation and deliberation. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) Accordingly, CALJIC No. 8.73 provides that if the evidence showed provocation insufficient to reduce the crime to manslaughter, the jury might nevertheless consider evidence of provocation when deciding whether the killing was premeditated and deliberate.

Here, even had Falcon had properly requested the instruction, and assuming arguendo the evidence was sufficient to warrant its use, the omission was harmless. When reviewing purportedly ambiguous jury instructions, we ask whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution. (*People v. Welch* (1999) 20 Cal.4th 701, 766.) Instructions are not considered in isolation. "Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury[,]" (*People v. Holt* (1997)15 Cal.4th 619, 677), rather than by reference to " ' " 'parts of an instruction or from a particular instruction.' " [Citations.]' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

The trial court instructed the jury on first and second degree murder. These instructions adequately informed the jury that provocation could be considered when determining the degree of murder. CALJIC No. 8.20 informed the jury, "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection *and not under a sudden heat of passion or other condition precluding the idea of deliberation*, it is murder of the first degree." (Italics added.) CALJIC No. 8.20 defined "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action," and defined "premeditated" as "considered beforehand." Further, the instruction stated that "a mere unconsidered and rash impulse,

even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree." The second degree murder instruction, CALJIC No. 8.30, informed jurors that, "Murder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation."

Falcon's jury would readily have understood from these instructions that it was required to consider evidence of provocation for its effect on premeditation and deliberation. If the jury believed Falcon acted in a rage provoked by the victim's laughter, and did not carefully consider his actions, the instructions given would have precluded a first degree murder verdict. If the jury had adopted this view of the evidence, it could have convicted Falcon of second degree murder. Nothing prevented jurors from using their common sense to consider whether Falcon's mental state was inconsistent with a finding of premeditation and deliberation. In other words, although CALJIC No. 8.73 would have amplified the properly given instructions, it was not necessary to the jury's proper evaluation of the evidence.

5. *Instruction with a modified version of CALJIC No. 2.52 was not improper.*

Falcon contends use of a flight instruction violated his due process rights because there was a delay between the shooting and the flight. The trial court's instruction, he urges, allowed the jury to infer guilt "based on conduct which did not occur immediately after the shooting and did not involve appellant being accused of a crime." We disagree.

a. *Additional facts.*

Williams testified the shooting occurred at approximately 3:00 p.m. Officer Richard Mendoza testified that he arrived at Jesse Owens Park at approximately 5:00 or 5:30 p.m., after being notified that a homicide had occurred "earlier" in the day.[9]

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[9] The record reflects that the prosecutor asked, "Sometime on March 17th, 2004, were you on duty?" and "were you notified that a homicide had occurred earlier on that date?" Allen was shot on September 17, 2004, not March 17. It is unclear whether the prosecutor misspoke, or the reporter made a typographical error in the transcript.

Mendoza was given a description of the suspects as having shaved heads, with one wearing a plaid shirt. While near the location of the crimes, he saw Falcon and another male Hispanic, Emanuel Martinez. Both had shaved heads, and Martinez was wearing a plaid shirt. Both men appeared startled when Mendoza's police vehicle approached. Martinez was apprehended; Falcon ran into his residence at 2133 West Century. At trial, Mendoza did not recall what time the shooting occurred. Defense counsel's comments and jury argument indicated his belief that Mendoza's observation of Falcon occurred at 9:00 p.m., six hours after the shooting.

Prior to instructing the jury, the trial court stated that the prosecution had requested CALJIC No. 2.52, regarding flight. However, the trial court believed, based on reasoning not at issue here, that the instruction was inappropriate as to any flight by the shooter from the crime scene. The court therefore modified the instruction to make it applicable only to Falcon's flight from Officer Mendoza. Defense counsel objected to the instruction, stating that "[m]erely going into one's house at nine o'clock at night is not flight" and that "it's six hours after the incident and it's [Falcon's] home." The trial court responded that it was a factual question for the jury. Because the prosecutor intended to argue Falcon's reaction to the officer indicated consciousness of guilt, the trial court felt obliged to give the flight instruction.

Accordingly, the trial court gave the following modified version of CALJIC No. 2.52. "There has been testimony from Officer Mendoza that he saw the defendant look in his direction and then run into the residence at 2133 Century Blvd. This evidence of flight, if believed by you, is not sufficient in itself to establish the defendant's guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether the defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

However, assuming the prosecutor misspoke, the error would have been apparent to jurors and Mendoza's testimony made clear he was testifying regarding the crimes that occurred on September 17. Though pointed out by appellant, the error has no bearing on our analysis.

b. *Discussion.*

A court must instruct on the principles of law relevant to the issues raised by the evidence, and has the correlative duty to refrain from instruction on principles of law that are irrelevant. (*People v. Armstead* (2002) 102 Cal.App.4th 784, 792; *People v. Mobley* (1999) 72 Cal.App.4th 761, 781.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Robinson* (1999) 72 Cal.App.4th 421, 428.)

"Section 1127c requires a trial court in any criminal proceeding to instruct as to flight where evidence of flight is relied upon as tending to show guilt. CALJIC No. 2.52, which is derived from section 1127c, advises the jury 'that evidence of flight alone is insufficient to establish guilt, but may be considered with other proven facts in deciding the question of guilt or innocence.' [Citation.] Contrary to defendant's position, the instruction neither requires knowledge on a defendant's part that criminal charges have been filed, nor a defined temporal period within which the flight must be commenced, nor resistance upon arrest. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1182, fn. omitted; *People v. Mason* (1991) 52 Cal.3d 909, 941 ["Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt."].) " ' "[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." ' [Citations.] '*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so.' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Smithey*, *supra,* 20 Cal.4th at p. 982.)

Falcon's argument that the two- to six-hour delay between the shooting and Mendoza's observations precluded a flight instruction is incorrect. (See *People v. Carter*, *supra,* 36 Cal.4th at p. 1182 [flight instruction warranted where defendant departed

California in the days immediately following the charged offenses and traveled to Arizona with murder victim's car]; *People v. Mason, supra,* 52 Cal.3d at pp. 941-943 [evidence of flight occurring four weeks after charged murder was properly admitted as evidence of consciousness of guilt].) Instead the relevant question is whether, given the totality of the circumstances, his conduct upon seeing Officer Mendoza suggested a purpose to avoid being observed or arrested. We believe that the instruction was warranted. Falcon did not simply return to his home. The evidence showed that, upon seeing Officer Mendoza's marked police car, Falcon appeared startled and ran to his home. Falcon was in the vicinity of the crimes, a few hours after their commission. While perhaps not overwhelming, the evidence was nonetheless suggestive of a purpose to avoid being observed or apprehended by police.

Moreover, even assuming arguendo that the instruction was given in error, it was harmless. "The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it." (*People v. Carter, supra,* 36 Cal.4th at pp. 1182-1183; *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) The jury was told to disregard any instruction "which applies to facts determined by you not to exist." (CALJIC No. 17.31.) Further, CALJIC No. 2.52's cautionary nature benefits a defendant, " 'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]' " (*People v. Boyette* (2002) 29 Cal.4th 381, 438-439; see *People v. Henderson* (2003) 110 Cal.App.4th 737, 742.) No prejudicial error is apparent.

6. *Falcon has not established ineffective assistance of counsel.*

Falcon's petition for a writ of habeas corpus asserts defense counsel's ineffectiveness in failing to offer documentary evidence in support of Falcon's case, and in failing to avoid the presentation of inconsistent defenses.

a. *Purported failure to present evidence that the People were aware of Falcon's alibi before trial.*

The prosecutor attempted to demonstrate that Falcon's alibi defense was a recently fabricated story created just before the start of trial. To that end, the prosecutor attempted

to show that Falcon's girlfriend, Hernandez, had never disclosed Falcon's alibi to the People until the day before trial. Falcon contends defense counsel was ineffective for failing to present available documentary evidence to show Hernandez had provided information on his alibi significantly in advance of trial.

When cross-examined, 17-year-old Hernandez initially testified that she had informed defense counsel that Falcon had been with her at the time of the crimes "[s]ince the day [Falcon] got arrested." However, subsequently the prosecutor elicited that in May 2005, when a defense investigator interviewed Menjivar, Hernandez did not volunteer that Falcon had been with her; she had not told defense counsel of the alibi until a day before jury selection; and she had never called police to inform them of Falcon's alibi. She had, however, told Falcon's family that he had been with her.

Falcon urges that counsel should have rehabilitated Hernandez by presenting documentary evidence showing that "someone from defense counsel's office informed detectives of a possible alibi defense more than ten months before trial and gave detectives Hernandez's name about a week and a half after petitioner was arrested."

In support of this contention, Falcon points to two documents attached in support of his habeas petition. The first is a page of a chronological log from a detective's "murder book," i.e., a compilation of notes and records related to police investigation of the crimes. The entry relied upon, however, would not have served to bolster Hernandez's testimony. The entry in question, dated November 3, 2004, simply states, "Spoke w/paralegal for Larry Young – atty for David Falcon. Adv. of poss. alibi. C. Notes Sept. 22." This document was far too nonspecific to prove Hernandez had informed police or defense counsel of Falcon's alibi. Counsel cannot be faulted for failing to introduce evidence that was so lacking in probative value.

Second, Falcon points to a page of Detective Burciaga's notes, dated October 15, 2004, containing Hernandez's name, address, and a redacted telephone number. This document is equally unhelpful in proving Hernandez provided alibi information earlier. The entry contains nothing suggesting Hernandez had provided any information regarding an alibi. Again, defense counsel did not perform inadequately by failing to

make what would likely have been a futile attempt to disprove Hernandez's testimony using the nonspecific notation in Burciaga's notes. Simply put, neither of the cited documents support Falcon's ineffective assistance claim. Counsel could have made a reasonable tactical decision to forgo offering the proposed evidence. Further, as the People point out, counsel did attempt to counter the suggestion that Hernandez's story was a recent fabrication, by eliciting from Hernandez that she told Falcon's family of the alibi, and trusted them to relay the information to the proper persons. Defense counsel also elicited that Hernandez had not approached police with the information because police had abused Falcon's mother, the implication being Hernandez was afraid of police brutality.

After this matter was submitted, Falcon supplemented his habeas petition with a declaration from trial counsel's paralegal, Derek Porter.[10] In that declaration, Porter avers, inter alia, that "[e]arly on in the case," Hernandez informed him Falcon was with her at the time of the murder. Hernandez also told him that an "independent witness" who was not a family member could confirm her story. Porter thereafter telephoned "Detectives Burciaga and/or Myers two or three times" and informed them of Hernandez's account and contact information, as well as the fact that the individual who could corroborate Hernandez's account lived at Hernandez's residence. Porter avers that he cannot provide more specific dates due to poor recordkeeping at trial counsel's office.

Presumably, Falcon intends to assert that trial counsel should have relied upon Porter's testimony to bolster Hernandez's alibi testimony. Assuming arguendo that competent trial counsel would have had Porter testify, we discern no prejudice. Regardless of when Hernandez told defense counsel about Falcon's alibi, the jury was likely to view her as biased in Falcon's favor, because she was his girlfriend. Porter's testimony would have done little or nothing to counteract that impression. Further, the

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[10] Porter's declaration explains that he did not provide a declaration sooner because he had not felt comfortable doing so while employed at trial counsel's office. He has since left trial counsel's employ. Appellate counsel's declaration further explains why Porter's declaration was not available sooner.

evidence against Falcon was strong. He was identified by two eyewitnesses. Falcon directed police to the murder weapon, which was found in his home. The defense account of a strange man inexplicably dropping off the gun at Falcon's residence was not compelling. Falcon did not provide an alibi to police. Instead he told police he was one of the two men on the bicycle, but his brother was the shooter. Moreover, as we have noted, defense counsel did an adequate job countering the suggesting that Hernandez's story was a recent fabrication. Under these circumstances, it is not reasonably probable that the outcome would have been more favorable for Falcon had Porter testified. (See generally *People v. Holt*, *supra*, 15 Cal.4th at p. 703.)

b. *Failure to present evidence that Noemi Ciao's statements were known to the People before trial.*

In a similar vein, Falcon argues counsel was ineffective for failing to offer evidence showing the defense provided Noemi Ciao's name and workplace information to authorities early in the investigation. Falcon argues that "[f]rom the beginning," his family believed "Joker" was the culprit in the shooting. To corroborate this theory, as set forth above, the defense called Ciao to testify that she saw Joker running from the park at the time of the shooting. Detective Myers, however, testified that Falcon's family never provided Ciao's name to police. In support of his habeas petition, Falcon presents a page of Detective Burciaga's notes, dated October 11, 2004. Those notes contain the notation "Joker on bicycle. Central & 99th. Chrome bike." "Domino's 'Niomi' knows Joker. Niomi works at Domino[s]."

Assuming arguendo that Falcon's family was the source of the information contained in the notes at issue, Falcon has failed to demonstrate prejudice. The prosecutor elicited from Ciao that police came to interview her within a few weeks after the murder (although she was apparently not at work). Thus, it was already established that police were aware of Ciao's relevance as a potential witness, dispelling any inference that her testimony was a late-breaking fabrication. Counsel was not ineffective for failing to offer cumulative evidence on the point.

c. *Presentation of an alibi defense.*

Finally, Falcon complains counsel was ineffective for presenting an alibi defense before ascertaining whether Falcon's statements admitting his presence at the crime scene would be admissible. He argues there is no conceivable tactical justification for defense counsel's decision to present an alibi defense, knowing petitioner had told the police he was present at the crime scene. Falcon also points to counsel's closing argument, in which he stated he did not know why Falcon made the statements to police, but that he would not call him to the stand to explain them: "I'm not going to get him up here and [have him] blither and bluther and be torn apart as to why he would say something stupid as that."

Counsel was faced with a difficult factual situation not of his own making. On the one hand, Falcon's statements to police suggested he was present at the crime scene. However, Falcon's story was not particularly believable and his account of the crime did not correspond to the statements of the eyewitnesses. Falcon could have been exculpated using this theory only if the jury believed his companion unexpectedly shot the victim. This possibility was largely undercut by testimony that the bicyclists left and returned, and that the nonshooter directed the shooter which victim to aim at. Thus, counsel could reasonably have concluded the chances of success on this theory were slim.

On the other hand, counsel could reasonably have concluded the alibi defense was considerably stronger. Not only did Falcon's girlfriend testify he was with her at the time of the shooting, but a boarder in the girlfriend's home, who was not as likely to appear biased, corroborated this testimony. Further, the alibi evidence was strengthened by Ciao's testimony that she had seen "Joker" riding a bicycle in the area at the time of the shooting. Counsel could reasonably conclude this theory had a greater likelihood of success. Thus, counsel was placed in a difficult position, facing contradictory evidence if he relied upon the stronger theory. Defense counsel does not necessarily render ineffective assistance by arguing inconsistent defenses. (See *People v. Lewis* (1990) 50 Cal.3d 262, 291-292.) In short, counsel did the best he could under difficult circumstances.

In any event, Falcon does not convince us that a more favorable outcome was reasonably probable had counsel eschewed the alibi defense. As we have noted, the theory that Falcon was present with his brother, but was not the shooter, was not particularly persuasive. Falcon directed police to the gun used at the scene, and was identified by the witnesses. Thus, the evidence of Falcon's guilt was strong. Even if counsel had refrained from offering the alibi defense, there is no reasonable likelihood that the jury would have rendered a more favorable verdict.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.